No. 79-1469

JUL 24 1

MICHAEL RODAK,

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOANNE ERSKINE COSE, PETITIONER

v.

LEROY EDWARD COSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE
Solicitor General

ALICE DANIEL
Assistant Attorney General

ANTHONY J. STEINMEYER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1469

JOANNE ERSKINE COSE, PETITIONER

v.

LEROY EDWARD COSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether federal law prohibits the division of military retired pay in divorce proceedings in accordance with state community property law.

TABLE OF CONTENTS

	Page
Statement	1
A. Military retired pay	1
B. The present proceedings	3
Discussion	5
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Bell v. *United States*, 366 U.S. 393 1

Cearley v. *Cearley*, 544 S.W. 2d 661 14

Chisnell v. *Chisnell*, 82 Mich. App. 699, 267 N.W. 2d 155, cert. denied, 442 U.S. 940 13

Czarnecki v. *Czarnecki*, 123 Ariz. 466, 600 P.2d 1098 ..... 10, 14

Ellis v. *Ellis*, 552 P.2d 506 5

Fenney v. *Fenney*, 259 Ark. 858, 537 S.W. 2d 367 5

Fithian, *In re*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, cert. denied, 419 U.S. 825 ..... 5, 9, 10, 13

Flemming v. *Nestor*, 363 U.S. 603 1

Free v. *Bland*, 369 U.S. 663 7

Gorman v. *Gorman*, 90 Cal. App. 3d 454, 153 Cal. Rptr. 479 10

Henn v. *Henn*, 605 P.2d 10, 161 Cal. Rptr. 502 14

Hisquierdo v. *Hisquierdo*, 439 U.S. 572 ..... 4, 6, 7, 8, 12, 13, 14, 15

LeClert v. *LeClert*, 80 N.M. 235, 453 P.2d 755 5

Cases—Continued: Page

Lynch v. *United States*, 292 U.S. 571 1

Miller, In re, 609 P.2d 1185 14

Musser, In re, 70 Ill. App. 3d 706, 388 N.E. 1289 10

Payne v. *Payne*, 82 Wash. 2d 573, 512 P.2d 736 5

Ramsey v. *Ramsey*, 96 Idaho 672, 535 P.2d 53 ..... 5, 13

United States v. *Stelter*, 567 S.W. 2d 797 . 13

United States v. *Yazell*, 382 U.S. 341 6

Wells, In Re, 57 Comp. Gen. 420 12

Wetmore v. *Markoe*, 196 U.S. 68 6

Wissner v. *Wissner*, 338 U.S. 655 .... 6, 7, 8, 15

Constitution, statutes and regulation:

United States Constitution, art. VI, cl. 2 (Supremacy Clause) 4, 6, 13

Civil Service Retirement Act, 5 U.S.C. 8331 *et seq.* 1

5 U.S.C. (Supp. II) 8345(j) 13

Military retirement statutes:

Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431 *et seq.*:

10 U.S.C. 1431–1446 ..... 2, 9

10 U.S.C. 1431(c) 2

10 U.S.C. 1434(a) 10

10 U.S.C. 1434(c) 2, 10

10 U.S.C. 1440 ..... 3, 10

Survivor Benefit Plan, 10 U.S.C. 1447 *et seq.*:

10 U.S.C. 1447–1455 ..... 2, 9

10 U.S.C. 1447(3) 10

10 U.S.C. 1448(a) 2

Statutes—Continued: Page

10 U.S.C. 1450(a) 10
10 U.S.C. 1450(i) 3, 10
10 U.S.C. 3504 1
10 U.S.C. 3911 1
10 U.S.C. 3929 1
10 U.S.C. 3991 1
10 U.S.C. 8504 1
Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.* 1
45 U.S.C. 231c 8, 9
45 U.S.C. 231d(c)(3)(B) 8
45 U.S.C. 231m 8
26 U.S.C. 61(a)(11) 1
Social Security Act, 42 U.S.C. 301 *et seq.* . 1
42 U.S.C. 402(b)(1) 8
42 U.S.C. (Supp. II) 659 3
42 U.S.C. (Supp. II) 659(a) 11, 12
42 U.S.C. (Supp. II) 662(c) 3, 12
Pub. L. No. 92-425, Section 3, 86 Stat. 711, as amended, Pub. L. No. 93-155, Title VIII, Section 804, 87 Stat. 615 3
Alaska Stat. § 9.55.210(6) (Michie July 1973 & Cum. Supp. 1979) 4
26 C.F.R. 1.61-11 1

Miscellaneous:
118 Cong. Rec. (1972):
p. 29811 2
p. 30151 11
Goldberg, *Is Armed Services Retired Pay Really Community Property?*, 48 Cal. St. Bar J. 12 (1973) 9
H.R. Rep. No. 951, 90th Cong., 1st Sess. (1967) 10

Miscellaneous—Continued: Page

H.R. Rep. No. 92-481, 92d Cong., 1st Sess. (1971) 9

H.R. 2817, 96th Cong., 1st Sess. (1980) ... 13

H.R. 6270, 96th Cong., 2d Sess. (1980) 13

S. Rep. No. 1480, 90th Cong., 2d Sess. (1968) 9, 11

S. Rep. No. 92-1089, 92d Cong., 2d Sess. (1972) 11

S. Rep. No. 93-1356, 93d Cong., 2d Sess. (1974) 12

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

A. *Military Retired Pay*

Under the military retirement statutes, a regular or reserve commissioned officer in the Army may request retirement after 20 years of service and become entitled to "military retired pay." 10 U.S.C. 3911, 3929. The computation of the benefit received by the service member is based on the number of years served and the rank attained. 10 U.S.C. 3991. These retirement plans are noncontributory in that neither the service member nor the federal government makes periodic contributions to any fund during the course of an officer's active service.[1]

Upon retirement, a regular officer remains subject to recall to active duty in times of need. 10 U.S.C. 3504, 8504. Additionally, Congress is free to alter or eliminate the military retirement system at any time. See *Lynch* v. *United States*, 292 U.S. 571, 576–577 (1934); *Bell* v. *United States*, 366 U.S. 393 (1961). Accordingly, anticipated benefits under the statutes are not "property" in the strictest sense. See *Flemming* v. *Nestor*, 363 U.S. 603, 609–611 (1960). Military retired pay is taxable as ordinary income when received. 26 U.S.C. 61(a)(11); 26 C.F.R. 1.61–11.

[1]The military retirement program is thus distinguishable from contributory programs such as those under the Civil Service Retirement Act, 5 U.S.C. 8331 *et seq.*, the Railroad Retirement Act of 1974, 45 U.S.C. 231 *et seq.*, and the Social Security Act, 42 U.S.C 301 *et seq.*

Military retired pay terminates with the service member's death and thus does not pass to his heirs. The statutes, however, do provide a mechanism by which service members may elect to set aside a portion of their retired pay for survivors. Under the Retired Serviceman's Family Protection Plan, a participating service member may elect to reduce his retired pay in order to provide an annuity to a surviving spouse or child upon his death. 10 U.S.C. 1431–1446. Participation in the plan is entirely voluntary, and a service member may revoke his election "to reflect a change in the marital or dependency status of the member or his family that is caused by death, divorce, annulment, remarriage, or acquisition of a child." 10 U.S.C. 1431(c). Should the chosen beneficiary be rendered ineligible for the annuity through death or divorce, the retired pay is fully restored. 10 U.S.C. 1434(c) (no deduction may be made from the elector's retired or retainer pay after the last day of the month in which there is no eligible spouse because of death or divorce).

In 1972, Congress enacted the Survivor Benefit Plan to replace prospectively the Family Protection Plan. 10 U.S.C. 1447–1455. The original plan was actuarially sound, *i.e.*, the total amounts paid to survivors were equivalent in value to the amount withheld from the member's retired pay. Because benefits thus reduced the service member's pay, participation in the plan was low. Consequently, Congress provided in the Survivor Benefit Plan, or "widow's equity bill," as it was known (118 Cong. Rec. 29811 (1972)) that future retirees are to be participants unless they choose to opt out. 10 U.S.C. 1448(a). Present participants in the

Family Protection Plan were given the option of continuing participation or enrolling in the new plan Pub. L. No. 92-425, Section 3, 86 Stat. 711, as amended. Pub. L. No. 93-155, Title VIII, Section 804, 87 Stat. 615.

Both plans contain provisions prohibiting the garnishment or assignment of annuities. The Family Protection Plan provides: "No annuity payable under this subchapter is assignable or subject to execution, levy, attachment, garnishment, or other legal process." 10 U.S.C. 1440. Similarly, 10 U.S.C. 1450(i), which is part of the Survivor Benefit Program, provides: "An annuity under this section is not assignable or subject to execution, levy, attachment, garnishment, or other legal process." The only exception to these anti-assignment clauses is contained in Section 459 of the Social Security Act, 42 U.S.C. (Supp. II) 659, which permits garnishment of all federal benefits to satisfy a legal obligation for alimony or child support. "Alimony" is defined for these purposes "not [to] include any payment or transfer of property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." 42 U.S.C. (Supp. II) 662(c).

B. *The Present Proceedings*

Respondent served in the United States Army from 1954 until he retired as a Lieutenant Colonel on July 1, 1975 (Pet. App. 3a). Upon the divorce of respondent and petitioner on October 29, 1976,[2] the Anchorage

[2]The parties were married on November 14, 1954, five months after respondent commenced active duty (Pet. App. 3a).

Superior Court held respondent's military retired pay divisible under state law[3] and awarded petitioner one-half the $1,100 monthly payment,[4] terminable upon either party's death (Pet. App. 4a). Respondent appealed this order on two grounds—(1) that the retired pay was income and not property subject to division, and (2) that regardless of the court's characterization of retired pay, the division was barred by the Supremacy Clause since it interfered with the congressional purpose underlying the military retirement pay statutes (Pet. App. 4a).

The Alaska Supreme Court reversed (Pet. App. 3a–8a), holding that the Supremacy Clause prohibited the application of state property settlement concepts to military retired pay. The court based its decision on the legislative treatment of military retired pay and this Court's recent decision in *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), holding that California's application of community property law to railroad retirement benefits contravened the intent of Congress in violation of the Supremacy Clause.

---

[3] Alaska Stat. § 9.55.210(6) (Michie July 1973 & Cum. Supp. 1979) provides:

> *Judgment.* In a judgment in an action for divorce or action declaring a marriage void or at any time after judgment, the court may provide:
>
> * * * * *
>
> (6) for the division between the parties of their property, whether joint or separate * * *.

[4] Respondent was awarded custody of the parties' two minor children, and petitioner was ordered to deduct child support from her military retired pay award (Pet. App. 4a n.1).

The Alaska Supreme Court reasoned that, in enacting the military annuity provisions, Congress evidenced its intent to protect widows and not ex-wives, since only widows are eligible for benefits and since annuity payment deductions from retired pay cease upon divorce (Pet. App. 7a). After observing that Congress had stricken provisions that would have protected ex-wives before passage of the plan, the court concluded that "[o]ne searches the statutes in vain for any indication that Congress has ever treated retired pay as property or has intended retired pay to be divisible upon divorce." *Ibid.* In view of its holding on the preemption issue, the court found it "unnecessary to classify retired pay as income or property under state law." *Ibid.*[5]

DISCUSSION

The principles applicable to the question presented in this case have been established in several decisions of this Court concerning the relationship between federal statutes and state family law. As the Court re-

[5]The Alaska Supreme Court observed that those courts holding that military retired pay is "property" divisible upon divorce have reasoned that the pay compensates for past services and is part of the consideration earned by the serviceman (Pet. App. 5a). See, *e.g.*, *Ramsey* v. *Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975); *In re Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, cert. denied, 419 U.S. 825 (1974); *Payne* v. *Payne*, 82 Wash. 2d 573, 512 P.2d 736 (1973); *LeClert* v. *LeClert*, 80 N.M. 235, 453 P.2d 755 (1969). Other courts have rejected this reasoning and held that military retired pay is income to the recipient rather than divisible property, because it has no lump sum value, cash surrender value, loan value, redemption value, or value realizable after death. See, *e.g.*, *Ellis* v. *Ellis*, 552 P.2d 506 (Colo. 1976); *Fenney* v. *Fenney*, 259 Ark. 858, 537 S.W. 2d 367 (1976).

cently remarked in *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), where the application of "state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted." *Id.* at 581, quoting *Wetmore* v. *Markoe*, 196 U.S. 68, 77 (1904). Where state family and family-property law "do 'major damage' to 'clear and substantial' federal interests, * * * the Supremacy Clause will demand that state law be overridden." *Ibid.*, quoting *United States* v. *Yazell*, 382 U.S. 341, 352 (1966).

In our view, state courts' treatment of military retired pay as divisible property under state law (a treatment distinct from awarding alimony, based on an assessment of need, to be paid out of such benefits) is inimical to the objectives of the federal program. Accordingly, under *Hisquierdo* and earlier decisions of this Court reaffirmed in *Hisquierdo*, such an application of state law is preempted. The Alaska Supreme Court correctly applied *Hisquierdo* in this case, but its decision is in conflict with the decisions of the highest courts of other states on a matter of federal law. Because the issue is an important and frequently recurring one, and because the uncertainty has created problems in the administration of the military retired pay program, we ask this Court to grant the petition for certiorari and affirm the decision below.

1.a. In *Wissner* v. *Wissner*, 338 U.S. 655 (1950), an Army officer named his mother and father as beneficiaries under his National Life Insurance Policy, making

no provision for his wife.[6] The National Service Life Insurance Act provided that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance * * * and shall * * * at all times have the right to change the beneficiary or beneficiaries * * *." 338 U.S. at 658. In addition, the Act provided that the beneficiary would be "exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." *Id.* at 659. This Court held that California could not apply its community property law to the insurance proceeds because "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Id.* at 658. The Court reasoned that the lower court judgment requiring that one half of the policy proceeds be paid to the widow "nullifies the soldier's choice and frustrates the deliberate purpose of Congress." *Id.* at 659. See also *Free* v. *Bland*, 369 U.S. 663 (1962) (survivorship provision in federal law regarding United States Treasury bonds takes precedence over Texas community property law).

In *Hisquierdo* v. *Hisquierdo*, *supra*, this Court recently reaffirmed the principle of *Wissner*. In *Hisquierdo*, the California Supreme Court held that because a husband's railroad retirement benefits flowed in part from the husband's employment during the marriage, they were community property, even though under federal law the retiree had no enforce-

[6] The policy's premiums were paid out of the husband's salary, which was community property under California law.

able contract right to the benefits. 439 U.S. at 580. This Court reversed, holding that both the express language of the Railroad Retirement Act of 1974, which included an anti-assignment provision (45 U.S.C. 231m), and the purpose of the Act required that the benefits be shielded from division pursuant to state community property law. 439 U.S. at 585.

Although the Railroad Retirement Act provided additional benefits to non-employee spouses meeting certain requirements (45 U.S.C. 231c) such benefits terminated when "the spouse and the [employee] are absolutely divorced." 45 U.S.C. 231d(c)(3)(B). The Court concluded that "th[is] choice was deliberate" and that therefore "[a]ny automatic diminution of that amount frustrates the congressional objective." 439 U.S. at 585.[7] In reaching this result, the Court stated that "[t]he pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition." *Id.* at 583.

b. The military retired pay statutes, read in light of the principles set out in *Wissner* and *Hisquierdo*, answer both of these questions affirmatively. Underlying the military retirement program is a congressional de-

[7]The Court also reasoned that any reduction in benefits received would discourage the divorced employee from retiring (contrary to the Act's objective of assuring jobs for younger workers), because the former spouse has no claim to salary earned after the marital community is dissolved. 439 U.S. at 585. Moreover, the Court noted that when the Act was revised in 1974, a proposal to provide divorced spouses a benefit like that available under the Social Security Act (see 42 U.S.C. 402(b)(1)) was rejected. 439 U.S. at 585.

sire to bolster the morale of service members, provide an incentive for persons to remain in the armed services, and afford them material protection in later years. *In re Fithian*, 10 Cal. 3d 592, 517 P.2d 449, 111 Cal. Rptr. 369, cert. denied, 419 U.S. 825 (1974). Congress has characterized military retired pay as the service member's "personal entitlement payable to the retired member himself as long as he lives." S. Rep. No. 1480, 90th Cong., 2d Sess. 6 (1968). An automatic dilution, under state community property law, of this unrealized entitlement would be at odds with the supportive purpose of the retirement program (see Goldberg, *Is Armed Services Retired Pay Really Community Property?*, 48 Cal. St. Bar J. 12, 14 (1973)) as well as inconsistent with a more recent enactment that affects federal benefits generally by permitting garnishment for alimony (as narrowly defined) and child support.

Unlike the Railroad Retirement Act (see 45 U.S.C. 231c), the military retired pay statutes provide no employer-financed spousal benefits. The only mechanism by which a service member may provide an annuity for a surviving spouse or child is by electing to reduce his retired pay. 10 U.S.C. 1431–1446, 10 U.S.C. 1447–1455. Participation in these plans is entirely voluntary. As the House Report noted, "[t]he rights in retirement pay accrue to the retiree, and, ultimately, the decision is his as to whether or not to leave part of that retirement as an annuity to his survivors." H.R. Rep. No. 92–481, 92d Cong., 1st Sess. 9 (1971). Should the service member elect to participate in the plan, the right left to the surviving spouse is in the annuity and *not* the retired pay. See H.R. Rep.

No. 951, 90th Cong., 1st Sess. 5 (1967).[8] State court decisions awarding divorced wives a half interest in retired pay thus place ex-wives in a better position than that enjoyed by most widows under the military retirement statutes, because a widow receives monthly annuity payments generally amounting to less than half of monthly retired pay if her husband elected to participate in the annuity plan and she receives nothing at all if her husband elected not to participate. See *In re Fithian*, *supra*, 10 Cal. 3d at 600, 517 P.2d at 454, 111 Cal. Rptr. at 374.

This result is particularly anomalous in light of Congress' decision to designate widows, but not ex-wives, as eligible beneficiaries of annuities (10 U.S.C. 1434(a); 10 U.S.C. 1447(3), 1450(a)) and to provide in the Family Benefit Plan that deductions from retired pay for a wife's annuity cease upon divorce (10 U.S.C. 1434(c)). Congress deliberately made this policy decision at the urging of the Department of Defense in order "[t]o safeguard the participants' future retired pay when

---

[8] Annuities under both plans are protected by anti-assignment provisions (10 U.S.C. 1440; 10 U.S.C. 1450(i)). See page 3, *supra*. State courts have drawn different conclusions concerning the applicability of these provisions to retired pay itself. See *In re Musser*, 70 Ill. App. 3d 706, 710, 388 N.E. 1289, 1292 (1979) (there is no provision similar to 45 U.S.C. 231m in the Railroad Retirement Act precluding attachment of military pay); *Czarnecki* v. *Czarnecki*, 123 Ariz. 466, 600 P.2d 1098, (1978) (although anti-assignment language in 10 U.S.C. 1440 is similar to 45 U.S.C. 231m, Section 1440 is applicable only to annuities under the Family Protection Plan and not to retired pay); *Gorman* v. *Gorman*, 90 Cal. App. 3d 454, 153 Cal. Rptr. 479, 482 (1979) (anti-assignment provision applicable to military retired pay is narrower than anti-assignment clause construed in *Hisquierdo*).

* * * divorce occurs* * *." S. Rep. No. 1480, 90th Cong., 2d Sess. 13 (1968), quoting letter of the Acting General Counsel, Department of Defense, dated August 8, 1967.

Although the Survivor Benefit Plan contains no express provision for terminating annuity deductions upon divorce, the congressional policy did not change. That plan was enacted in response to Congress' concern for the number of widows deprived of support because of low participation in the Family Protection Plan, rather than out of a desire to provide for ex-wives. See S. Rep. No. 92-1089, 92d Cong., 2d Sess. 11 (1972). Indeed, in considering the Survivor Benefit Plan, Congress rejected a provision that would have permitted attachment of up to 50% of retired pay to comply with a court order in favor of a spouse, former spouse, or child. See *id.* at 25. The provision was rejected primarily because it would have "single[d] out military retirees for a form of enforcement of court orders imposed on no other employees or retired employees of the Federal Government." 118 Cong. Rec. 30151 (1972) (remarks of Rep. Pike). Thus, Congress determined that military retired pay should not alone be subject to attachment and that the problem should be considered in connection with legislation covering all federal pay. See S. Rep. No. 92-1089, *supra*, at 25.

Subsequently, Congress enacted legislation providing that, notwithstanding any contrary law, federal benefits, including those of members of the armed services, may be subject to legal process to enforce an individual's obligations to provide *child support* or *alimony payments*. 42 U.S.C. (Supp. II) 659(a). This

provision was part of a package of measures designed to combat increases in welfare payments resulting from the difficulty of compelling payment of support obligations from solvent but unwilling parents. See S. Rep. No. 93-1356, 93d Cong., 2d Sess. 42-43 (1974). In 1977, Congress added a definitional statute to provide that "alimony" does not include "any payment or transfer of property * * * in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." 42 U.S.C. (Supp. II) 662(c).

In light of the legislative history of these amendments, this Court in *Hisquierdo* found it "logical to conclude that Congress * * * thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals, but that community property claims, which are not based on need, could not do so." 439 U.S. at 587. The Court added that "Congress may find that the distinction it has drawn [between community property settlements and spousal support based on need] is undesirable" but that it is a choice for Congress to make and "[i]t is not the province of state courts to strike a balance different from the one Congress has struck." 439 U.S. at 590. Because 42 U.S.C. (Supp. II) 659(a) applies to military retired pay as well as to railroad retirement benefits, the Court's conclusions in *Hisquierdo* are equally applicable here.[9]

---

[9]The Comptroller General has ruled that in light of 42 U.S.C. (Supp. II) 659(a) and the 1977 definitional amendment, military retired benefits are not subject to division under community

In fact, Congress recently enacted legislation allowing garnishment of federal civil service retirement benefits to the extent expressly provided for in the terms of any "court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation." 5 U.S.C. (Supp. II) 8345(j). Congress has enacted no comparable provision allowing garnishment or division of other federal benefits.[10] Until it enacts such a provision with respect to military retired pay, state courts may not order a division of such pay under state community property law.

2. Prior to this Court's decision in *Hisquierdo*, state courts grappled with the question whether dividing military retired pay pursuant to state family property law frustrated the federal policy in contravention of the Supremacy Clause. See, *e.g.*, *In re Fithian*, *supra*; *Chisnell* v. *Chisnell*, 82 Mich. App. 699, 267 N.W.2d 155 (1978), cert. denied, 442 U.S. 940 (1979); *Ramsey* v. *Ramsey*, 96 Idaho 672, 535 P.2d 53 (1975).

---

property statutes. See *In re Wells*, 57 Comp. Gen. 420 (1978). See also *United States* v. *Stelter*, 567 S.W. 2d 797 (Tex. 1978) (United States cannot be made party to a Texas garnishment proceeding to enforce a divorce decree dividing military retired pay as community property).

[10] Legislation has been introduced in Congress that would affect the status of military retired pay. H.R. 2817, 96th Cong., 1st Sess. (1980), would establish an entitlement in favor of a divorced spouse who has been married to a service member for at least ten years to a portion of the member's retired pay and a portion of the survivor's annuity. H.R. 6270, 96th Cong., 2d Sess. (1980), would provide for the payment of military retired pay pursuant to a local divorce decree or legal separation. The latter proposal would thus achieve the same result as the recently enacted civil service legislation. See 5 U.S.C. (Supp. II) 8345(j).

Although *Hisquierdo* should have resolved the question against such an application of state law, several state supreme courts, in the short time since *Hisquierdo* was decided, have reached decisions contrary to that of the Alaska Supreme Court in this case. See *Czarnecki* v. *Czarnecki*, 123 Ariz. 466, 600 P.2d 1098 (1979); *Henn* v. *Henn*, 605 P.2d 10, 12 n.3, 161 Cal. Rptr. 502, 504 n.3 (1980); *In re Miller*, 609 P.2d 1185 (Mont. 1980).

As a result of the disagreement over whether *Hisquierdo* is controlling, federal military retired pay is currently subject to inconsistent treatment under state domestic relations law and has been held divisible in numerous divorce proceedings in community property and common law states (Pet. App. 4a–5a). These federal benefits affect far more people than were affected by the railroad retirement system involved in *Hisquierdo*. The Department of Defense appropriation for military retired pay for fiscal year 1979 alone exceeded $10 billion.

With the increasing incidence of divorce, this lack of uniform treatment of military retired pay creates problems both for those administering the program and for its beneficiaries, the retirees. Moreover, since several state courts have held that unmatured retired pay earned during the marriage is to be divided upon retirement, present members of the military seeking divorce are similarly affected. See *e.g. Cearley* v. *Cearley*, 544 S.W. 2d 661 (Tex. 1976). The mobility of the military population, coupled with the likelihood of transfer, complicates the problem and encourages forum shopping. Because we believe the principles of

Wissner and *Hisquierdo* are controlling here, we ask this Court to grant the petition for certiorari to resolve the current uncertainty and resulting injury to the military retired pay system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ALICE DANIEL
Assistant Attorney General

ANTHONY J. STEINMEYER
Attorney

JULY 1980

☆ U.S. GOVERNMENT PRINTING OFFICE: 1980 324546 31